IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

COMPANY PEITION NO.29 OF 2007
WITH
COMPANY APPLICATION NO.1140 OF 2006

In the matter of Scheme of
Arrangement between
Mather and Platt Fire Systems Ltd.
And
Unsecured Creditors.

Mather and Platt Fire Systems Limited
A Company incorporated under the
Companies' Act, 1956, having its Registered
Office at Mumbai-Pune Road,
Chinchwad (East), Pune-411 019. ...Petitioner.

.....

Mr. Shyam Mehta with Mr. Vikram Trivedi, Mr. S.R. Tilokchandani and Mr.Tanmaya i/b. M.K. Ambalal & Co. for the Petitioners.
Mr. M.P. S. Rao with Mrs. Deepa Chavan, Mr. V.R. Warerkar for MEC Tubes & other objectors.
Mrs. Deepa Chavan with Mr. V.R. Warerkar fo Kalpa Valves.
Mr. C.J. Joy with Ms. Madhuri Gaikwad for the Regional Director.
Mrs. K.V. Gautam, Dy. Official Liquidator present.

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CORAM : DR. D.Y. CHANDRACHUD, J.

April 30, 2007.

ORAL JUDGMENT :

The sanction of this Court is sought to a Scheme of Arrangement which the Petitioner proposes with its unsecured creditors under Sections 391 to 394 of the Companies' Act, 1956. The Petitioner was incorporated on 2nd July 1993 under the Companies' Act, 1956 as Veedip Financial Services Pvt. Ltd. On 13th September 2001, the name of the Petitioner was changed to Mather & Platt Fire Systems Pvt. Ltd. and on 5th October 2001 to Mather & Platt Fire Systems Ltd. In or about July 2005, a Share Purchase Agreement was entered into between the erstwhile promoters of the Petitioner and Wilo AG, a German Company ("Wilo") under which Wilo agreed to acquire the shareholding of the erstwhile promoters in the Petitioner subject to certain compliances including the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1977. Pursuant to the agreement, Wilo acquired 18,87,697 shares of the Petitioner. The Petitioner has consequently become a subsidiary of Wilo.

-2. The audited balance sheet of the Petitioner as of 30th June 2006 presents a grim picture. The gross value of the fixed assets was Rs. 54.56 lakhs and after allowing for a depreciation of Rs. 54.50 lakhs, the net block has been valued at Rs.6,200/-. The total investments were only Rs.21,100/-. Sundry debtors stood at Rs. 77.73 lakhs while cash and Bank balance were to the extent of Rs. 34.10 lakhs. The net current liabilities stood at Rs. 6.94 crores. A total loss of Rs. 10.34 crores was sustained.

-3. The Company Petition, contains an averment that the down turn in the business activities of the Petitioner resulted in a severe crisis of liquidity causing a mismatch in the position of the assets and liabilities. The circumstances responsible for this position have been spelt out in para 8 of the Company Petition thus:

> "The factors responsible for the present state of affairs inter alia include depressed market condition for more than (the) last five years, internal disputes among the past promoters, delays in completion of turnkey projects due to fault of parties, no technology upgradation in the business of the Petitioner Company, switching suppliers and service

> providers in the middle of on going projects (which) caused delays in implementation of projects, no corresponding incremental rise in contract price for redoing certain works which were outside purview of projects."

The business of the Company stagnated and activities were stated to be restricted merely to completing existing projects, recovering past dues and repayment to creditors. The net worth was completely eroded resulting in substantial accumulated losses.

-4. Negotiations were carried out by the Petitioner with its unsecured creditors with a view to arriving at a settlement. The negotiations, it has been stated, were not fruitful. The Petitioner has no secured creditors.

-5. On 20th September 2006, a meeting of the Board of Directors of the Petitioner took place at which a Scheme of Arrangement for restructuring of debts was approved. On 8th November 2006, the Bombay Stock Exchange furnished its no

objection and the Pune Stock Exchange did so on 14th November 2006.

-6. The proposed scheme was presented before the Court for its sanction and on 1st December 2006 directions were issued in Company Application 1140 of 2006 calling for a meeting of unsecured creditors of the Company as specified in clause 1.8 of the Scheme of Arrangement. The holding of a meeting of the shareholders of the Company was dispensed with upon a statement made by the Company that the shareholders would not be affected by the Scheme. A meeting of other unsecured creditors with whom no compromise or arrangement was proposed was also dispensed with in view of the statement made by the Company that their rights were not affected. The Chairman was directed to send notices to the unsecured creditors Under Certificate of Posting and to issue public notices in English and Marathi newspapers. Voting by proxy was permitted provided a proxy in a prescribed form duly signed by persons entitled to attend and vote at the meeting was filed with the Company not less than 48 hours before the commencement of the

meeting. The value of each of the unsecured creditors was to be assessed in accordance with the Books of Account of the Company and, where entries in the Books of Account were disputed, the Chairman of the meeting was empowered to determine the value for the purposes of the meeting. Accordingly, notices were despatched to the unsecured creditors and public notices came to be issued as directed by the Court.

7. On 30th December 2006, a meeting of the unsecured creditors took place. 99 unsecured creditors attended and voted at the meeting representing a total debt of the value Rs.5,22,28,215/-. The total value of the debt of unsecured creditors covered by the scheme is Rs.5,75,68,101/-. Of 99 ballot papers, 7 representing a debt of the value of Rs.1,28,61,222/- were rejected by the Scrutineer as invalid. Out of the of 92 valid ballot papers representing a debt of the value of Rs.3,93,66,993/-, 85 ballot papers representing a debt of the value of Rs.3,68,87,921/-, constituting 93.70% of the total valid votes cast were in favour of the Scheme. 7 ballot papers

representing a debt of the value of Rs.24,79,072/- constituting 6.30% of the total valid votes cast were against the Scheme. The names and details of the objecting creditors before this Court are as follows:

Name	Value of Deft (Rs)	Status of Vote
Mec Tues Pvt. Ltd.	69,92,125	Invalid.
Sanghvi Forging & Engineers Ltd.	2,99,446	Invalid.
Andhra Pradesh Power Generation Corporation Ltd.	37,25,895	Invalid.
New Fire Engineers Pvt.Ltd.	8,56,996	Invalid.
Rajendra Pipes & Fittings	3,17,921	Invalid.
Max Forge.	1,86,000	Valid.
Fire Mech.	20,016	Valid.
Kalpana Valves Mfg. Co. Pvt. Ltd.	5,03,012	Valid.
Ghosh Engg.Industries.	10,43,737	Valid
Kansal Pipes Fitting Co.	43,932	Valid.
Panja Engg. Pvt. Ltd.	6,62,765	Valid.

8. The Company Registrar in his capacity as Chairman of the meeting has submitted his report dated 16th January 2007, pointing out that the Resolution was carried by the requisite majority.

The Scheme :

9. The cut of date under the scheme is 31st July 2006. The expression “unsecured creditors” is defined in clause 1.8 of the Scheme as follows :

> “1.8 “Unsecured Creditors” would mean and include:
>
> i. Creditors who have supplied goods or rendered services to the Company and whose dues are neither in dispute nor time barred under provisions of any law.
>
> ii. Creditors whose dues are disputed but no decree has been executed against the Company.
>
> iii. Customers from whom advances have been received.
>
> iv. Contingent Creditors who have made a claim or have filed suits for recovery of amount towards loss caused due to the alleged improper execution or delay in execution/completion of projects or otherwise but such claim is disputed by the Company.
>
> v. Unsecured Creditors who have deposited monies in the nature of unsecured loans or deposits (not being a deposit within Section 58A of the Act but including inter corporate deposits, loans and advances from the group company) with the Company without any security and who do not have any charge on the assets of the Company.”

Clause 4.1 of the proposed Scheme of Arrangement/Compromise provides for three options for the payment of the outstanding dues of unsecured creditors, these being as follows:

> "Option 1
>
> The Unsecured Creditors will be paid 25% of the outstanding principal amount due as on Cut off Date within six months from the Effective Date or date of exercising the option whichever is later without interest and balance amount (including interest) should be waived off.
>
> Option II
>
> The Unsecured Creditors will be paid total 45% of the outstanding principal amount due and payable as on the Cut off Date (without interest) in the following manner:
>
> 5% of the outstanding principal amount due as on Cut off Date, within six months from the Effective Date or date of exercising the option, whichever is later.
>
> 40% of the outstanding principal amount due as on Cut off Date in four annual installments starting from 1st April 2011.
>
> Balance amount (including interest) should be waived off.
>
> Option III

> The Unsecured Creditors will be paid 100% of the outstanding principal amount due as on Cut off Date, at the end of twelve years from the Effective Date. The interest amount should be waived off."

Except for the payments stipulated as aforesaid, each of the unsecured creditors has to waive or write off the balance of the principal, interest, penal interest and other charges whatsoever including interest and penal interest relatable to the period after the cut off date. Payments stipulated in clause 4.1 are to be in full and final settlement of the outstanding dues.

10. One of the unsecured creditors of the Company is Mather and Platt Pumps Ltd. (MPPL). Both the Petitioner as a propounder of the scheme and MPPL are subsidiaries of the holding Company, Wilo AG of Germany. Clause 4.4 of the Scheme provides as follows:

> "4.4 MPPL, which is also one of the unsecured creditors, will not be paid its dues until proper arrangements are made to make payments to all the unsecured creditors covered under the Scheme as per the option selected by the respective unsecured creditors."

In other words, as a result of clause 4.4, MPPL is to have no

preferential rights in the payment of its debt. The scheme provides that MPPL will not be paid its dues until proper arrangements are made for making payment of all the unsecured creditors.

11. Of the 11 objectors before the Court in these proceedings, 5 belong to the category of those whose votes were declared as invalid, while six are those who had validly cast their votes against the scheme.

Submissions of the Objectors :

12. On behalf of the objectors the following submissions have been urged at the hearing of the petition. Firstly, it has been submitted that none of the objectors received individual notices of the meeting that was convened of the unsecured creditors for considering the scheme and that the publication in the newspapers was not adequate to place the objectors on notice of the meeting. The second submission is that out of the total votes representing a value of Rs. 3.68 crore of the debts of the Company which were cast in favour of the scheme, votes representing a debt value of Rs. 2.80

crores were cast by MPPL which together with the Petitioner is a subsidiary of the holding Company in Germany. Wilo AG has a controlling interest in both the Petitioner and MPPL and hence it has been urged that while convening meetings of the creditors, MPPL should have been treated as a separate class amongst the unsecured creditors. The third and related submission is that the balance sheet of the Petitioner would show that the liabilities owing to MPPL stood at Rs. 1.75 crores on 31st December 2005 which increased to Rs. 2.66 crores on 30th June 2006. It is submitted that no explanation is forthcoming for the basis or the reasons for the sudden increase in liabilities to MPPL. The increase in liabilities must, it was urged, be regarded as an attempt to increase the voting power of MPPL at the meeting of the unsecured creditors. Finally, it was submitted that votes of five of the objectors before the Court were wrongly declared as invalid and that the conduct of the Scrutineer in doing so cannot be regarded as bona fide. It was submitted that if the votes which were recorded as invalid were to be counted in computing the votes in favour of and against the scheme, the scheme would have to fail since 3/4th in value of the unsecured creditors would then not be

supportive of the scheme. Each of the objections can now be taken up for consideration:

(i) Notice :

13. On 1st December 2006, the Company Judge issued directions for convening and holding a meeting of the unsecured creditors. Clauses 3 and 4 of the order provided for the issuance of an advertisement in English and Marathi newspapers circulating in Pune and for a notice to be sent at least 21 days before the meeting to the unsecured creditors by a pre-paid letter posted under Certificate of Posting. The obligation to do so was cast by clause 7 of the directions upon the Chairman of the meeting, namely, the Company Registrar of this Court.

14. Rule 73(2) of the Companies (Court) Rules, 1959 provides that a notice of a meeting to the creditors has to be remitted by post Under Certificate of Posting to the last known address not less than 21 clear days before the date fixed for the meeting. The direction of the Court was, therefore, in pursuance of the provisions of Rule 73.

15. The Petitioner complied with the obligation cast upon the Company by the directions issued by this Court on 1st December 2006 by publishing an advertisement in the newspapers on 5th December 2006 and remitting the postal packets Under Certificate of Posting on 8th December 2006. The objection that there was an absence of notice holds no substance because all the 11 objectors, as a matter of fact, attended and voted at the meeting which was held on 30th December 2006. The record shows that the objectors were aware of the date, time and place of the meeting. The principal objector, who is the Managing Director of an unsecured creditor by the name of MEC Tubes Pvt. Ltd. claimed awareness of the meeting from 28th December 2006. He addressed a communication to the Company on 28th December 2006. His affidavit of objection shows that on 26th December 2006, his Company had passed a resolution of the Board of Directors authorising him to vote at the meeting. At the meeting, he had also addressed a letter to the Chairman and to the other creditors. Seven unsecured creditors voted against the resolution and six of them had cast their votes through proxies.

16. In these circumstances, the allegation of an absence of notice is without any merit whatsoever. In such cases, unless there is material before the Court to demonstrate that by a course of devious conduct, the Company has deliberately avoided to transmit individual notices, isolated instances cannot lead to the invalidation of a meeting held to consider a scheme propounded under Section 391 of the Companies' Act, 1956. In **Shailesh Harilal Shah vs. Matushree Textiles Ltd.**,[1] a Division Bench of this Court formulated the principle which must apply in such cases. While holding that the provisions of Section 171(1) of the Companies' Act, 1956 were directory and not mandatory, the Court held as as follows :

> "The Court will not proceed to invalidate the proceedings on the ground of insufficient duration of notice only when it is established that defect is not intentional or deliberate and no prejudice whatsoever is caused to a particular case by shorter duration of notice. It would be necessary for a party complaining of insufficient duration of notice to plead prejudice caused and in case such prejudice is established, then even though the provision is directory, the Court would grant the relief."

The Division Bench held that to hold otherwise would "lead to very

1 AIR 1994 Bombay 20

unusual results making it difficult for large public Companies to effectively function".

17. In the present case, even on merits, the grievance has been found to lack substance.

(ii) Class of Creditors :

18. The objection voiced before this Court is that MPPL should have been treated as a separate class among unsecured creditors and the votes cast by the Company should have been counted separately. The submission is founded on the premise that MPPL is a wholly owned subsidiary of Wilo AG, like the Petitioner. Hence, it was submitted that the interest of MPPL and the Petitioner overlap and it was necessary to count the vote cast by MPPL separately. In support, reliance was placed on an affidavit dated 3rd April 2007 of the Company Secretary in reply to the objections in which it has been stated that the scheme was propounded after a detailed exercise was carried out by the Petitioner "and after considering support from MPPL to fund (a) temporary mismatch of funds to implement the

scheme fully without any delay." Moreover, it was averred in the affidavit that as a result of the inability of the Petitioner to fulfill its contractual obligation with respect to its on going jobs, MPPL extended financial, managerial and technical support to the Petitioner in order to enable the Petitioner to fulfill its contractual obligations.

19. In assessing the submission, a reference would have to be made to Section 391 of the Companies' Act, 1956. Sub-section (1) of Section 391 provides as follows:

> "391(1) Where a compromise or arrangement is proposed -
>
> (a) between a company and its creditors or any class of them; or
>
> (b) between a company and its members or any class of them;
>
> the Court may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs."

Thereafter, the provisions of sub-section (2) lay down that if a majority

in number representing three-fourths in value of the creditors or class of creditors or members, or class of members, as the case may be, present and voting either in person or, by proxy, agree to any compromise or arrangement, the compromise or arrangement shall be binding on all the creditors, all the creditors of the class, all the members, or all the member of the class, as the case may be, and also on the Company. Clause (a) of sub-section (1) contemplates a situation where a compromise or arrangement is sought between a Company on one hand and its creditors or a class of them on the other. Similarly, under clause (b) a compromise or arrangement may take place between the Company on the one hand and its members or a class of them on the other. Sub-section (1) contemplates the holding of a meeting of the creditors or a class of creditors or of the members or class of members. The statute contemplates the holding of a meeting of a class of creditors or, as the case may be, a class of members where the compromise or arrangement is sought to be effected not with the creditors or members in general, but with a particular class among them. In such a case, the compromise or arrangement upon being sanctioned would affect the rights of a class

of members or a class of creditors. Hence it is, that class whose rights are to be affected that is furnished with an opportunity of giving vent to its views at a meeting of the class. The holding of a meeting of the class must, therefore, be considered in the context of the compromise. The definition of "class" is relatable to the terms of the compromise which affects or modifies the rights of that class.

20. The interpretation which has to be placed on the provisions of Sub-section (1) of Section 391 is no longer *res integra* and has been dealt with in several reported cases. The leading judgment of the Supreme Court on the subject is in **Miheer H. Mafatlal vs. Mafatlal Industries Ltd**.[2] The judgment of the Supreme Court is an authority for the proposition that a separate meeting of a class of members or a class of creditors is required to be convened where a compromise or arrangement is proposed between the Company and that class of members of creditors. Where the same terms of compromise are offered to a class of members or creditors, no separate meeting of a sub class among them is required. The Supreme Court held as follows:

2 1996 (87) Com.Cases 792

"On the express language of Section 391(1) it becomes clear that where a compromise or arrangement is proposed between a company and its members or any class of them a meeting of such members or class of them has to be convened. This clearly pre-supposes that if the scheme of arrangement or compromise is offered to the members as a class and no separate scheme is offered to any sub-class of members which has a separate interest and a separate scheme to consider, no question of holding a separate meting of such a sub-class would at all survive. Even otherwise it becomes obvious that as minority shareholder if the appellant had to dissent from the scheme his dissent representing 5% equity shareholding would have been visible both in a separate meeting, if any, of his sub-class or in the composite meeting where also his 5% dissent would get registered by the appellant either remaining present in person or through proxy. Consequently when one and the same scheme is offered to the entire class of equity shareholders for their consideration and when the commercial interest of the appellant so far as the scheme is concerned is in common with other equity shareholders he would have a common cause with them either to accept or to reject the scheme from a commercial point of view. ... It is also to be kept in view that it is not the case of the appellant that any different terms of compromise were offered to persons holding equity shares who were covered by the family arrangement of 1979 or otherwise. In fact the entire proposal of the scheme of arrangement was one affecting equally and in the like manner all the existing equity shareholders of the respondent-company. ... It is, therefore, obvious that unless a separate and different type of scheme of compromise is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class no separate meeting of such sub-class of the main class of members or creditors is required to be convened."

21. The same principle was enunciated in an earlier judgment of the Gujarat High Court in the case of **Maneckchowk and Ahmedabad Manufacturing Co. Ltd.**[3] Mr.Justice D.A. Desai noted that a class consists of a homogeneous group with a commonality of interest. The true test is that a class consists of persons whose rights are similar in terms of the compromise which is offered to others by the Company. The Learned Judge held as follows :

> " "Class" must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest (vide Soverign Life Assurance Co. vs. Dodd, (1892) 2 Q.B. 573 (C.A.)). Speaking very generally, in order to constitute a class, members belonging to the class must form a homogeneous group with commonality of interest. If people with heterogeneous interests are combined in a class, naturally the majority having common interest may ride rough shod over the majority representing a distinct interest. One test that can be applied with reasonable certainty is as to the nature of compromise offered to different groups or classes. The company will ordinarily be expected to offer an identical compromise to persons belonging to one class, otherwise it may be discriminatory. At any rate, those who are offered substantially different compromises each will form a different class. Even if there are different groups within a class the interests of which are different from the rest of the class or who are to be treated differently in the scheme, such groups must be treated as separate classes for the purpose of the scheme. Broadly speaking, a group of persons would constitute one class when it is shown that they have conveyed all interest and

3 1970(4) Com. Cases 819

> their claims are capable of being ascertained by any common system of valuation. The group styled as a class should ordinarily be homogeneous and must have commonality of interest and the compromise offered to them must be identical. This will provide rational indicia for determining the peripheral boundaries of classification. The test as stated earlier would be that a class must be confined to those persons whose rights are not so similar as to make it impossible for them to consult together with a view to their common interest."

A judgment of the Division Bench of this Court in the **State Bank of India vs. Alstom Power Boilers Ltd.**,[4] considered the tests which should be applied in defining a class of members or, as the case may be, of creditors. In so far as the class of creditors is concerned, the propositions which are culled out from the judgment of the Division Bench are as follows :

> "(ii) One of the tests to determine whether the two or more groups of members or creditors form a different class is whether the same scheme of arrangement or compromise offers the same terms to all or whether different terms are offered. If the scheme offers to the two group of members or creditors different terms of arrangements, they would generally form a different class.
>
> (iii) Another test is to see whether the rights of the two or more groups of members or creditors are so dissimilar that they cannot reasonably be expected to have a common interest and are not likely to consult together to

4 2003 (5) Bom.C.R. 421

> have a common view of their common interest. If their interests are so dissimilar that they are reasonably unlikely to take the same view about the scheme and would reasonably feel that any one view would unreasonably benefit one or unreasonably prejudice the other then they would form different classes.
>
> (iv) The private interest of one or a group of members or creditors vis-a-vis the directors of the company or the persons in the management of the company are alien for the purpose of classification. As held by the Apex Court in Mihir Mafatlal's case, the member or members or creditor or creditors claiming right against one or more directors of the company cannot claim that he or they constitutes a separate class only by reason of having a separate private right or interest."

The Division Bench further held thus:

> "Amongst unsecured creditors also there can be sub-classes. It was held in the case of Sovereign Life Insurance Company (supra) that the creditors whose policies had matured and who had crystallised claim would form a different sub-class from the creditors whose policies had not matured and whose claims were not crystallised. Amongst unsecured creditors, some may be preferred like the Government, or the workers who may have a statutory preference over others. It is difficult to enumerate the circumstances under which different creditors, secured or unsecured, would form a separate sub-class. But, the general principle would be the same namely whether the interest of the creditors who claim to belong to a different class are so dissimilar to the interest of the other creditors that it would be impossible for them to sit and consult together and take a common view of their common interest."

22. A recent judgment of the Court of Appeal in Singapore contains a lucid exposition of when it can be held that creditors who are "related parties" can be regarded as constituting a separate class for the purposes of voting. The judgment of the Court of Appeal in **Wah Yuen Electrical Engineering Pte.Ltd. vs. Singapore Cables Manufacturers Pte Ltd.**,[5] held thus :

> "Counsel for Wah Yuen correctly submitted that related party creditors did not constitute a separate class of creditors for voting purposes simply because they were related parties. This is because "the test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling a separate meeting". UDL Argos Engineering & Heavy Industries Co. Ltd. v. Li Oi Lin."

The Court of Appeal held that although the votes of a related party are counted for determining whether the statutory majority has been reached, the Courts have consistently attributed less weight to such votes when asked to exercise their discretion in favour of the scheme. That, the judgment held is because the related party may have been

5 (2003) 3 SLR 629

motivated by personal or special interests to disregard the interests of the class as such and to vote in a self-centred manner.

23. Finally, it would be necessary to note the judgment of Justice Templeman in the Chancery Division in the case of **Hellenic & General Trust Ltd**.[6] In that case the ordinary shares of a Company, Hellenic, were held as to 53.01 per cent by a Company called MIT. All the shares of MIT were held by another Company called Hambros by which MIT was wholly owned. The objector held 13.95 per cent of the shares of the Company proposed to be dealt with by the arrangement. As a result of the arrangement, the ordinary shares of the Company were to be cancelled and new shares were to be issued to Hambros by which the Company like MIT would become a wholly owned subsidiary of Hambros. The former shareholders of the Company were to be paid 48p per share by Hambros for the loss of their former shares. The submission before the Court on behalf of the Company was that since the parent and the subsidiary were separate corporations with separate Directors and since MIT was an ordinary shareholder, it followed that MIT had the same interest as the

6 (1975) 3 All ER

other shareholders. The submission that MIT was capable of forming an independent and unbiased judgment irrespective of the interest of the Appellant Company was held to be unreal. The Learned Judge held thus :

> "When the vendors meet to discuss and vote whether or not to accept the offer, it is incongruous that the loudest voice in theory and the most significant vote in practice should come from the wholly owned subsidiary of the purchaser. No one can be both a vendor and a purchaser and, in my judgment for the purpose of the class meetings in the present case, MIT were in the camp of the purchaser. Of course this does not mean that MIT should not have considered at a separate class meeting whether to accept the arrangement. But their considerations will be different from the considerations given to the matter by the other shareholders. Only MIT could say, within limits, that what was good for Hambros must be good for MIT."

24. In the present case it would merit emphasis that MPPL is an unsecured creditor of the Petitioner. The scheme as propounded confers no higher rights upon MPPL than those conferred upon other unsecured creditors. In the balance sheet, Wilo AG is disclosed as a related party being the holding Company of the Petitioner. Other parties with whom the Company had entered into transactions during the year, include MPPL which is classified under the sub heading of

"Associate" and described as a subsidiary of the holding Company. The balance sheet discloses that as of 31st December 2005, the advances from MPPL were to the extent of Rs. 1.76 crores, while as of 30th June 2006 that figure increased to Rs. 2.16 crores. MPPL is for the purposes of the scheme, an unsecured creditor like the objectors, in terms of the definition of the expression in clause 1.8. Clause 4.4 of the scheme posits that MPPL is also one of the unsecured creditors and an assurance is held out that MPPL would not be paid its dues until proper arrangements were made for making payment to all unsecured creditors covered under the scheme in accordance with the option selected by each unsecured creditor. The rights of MPPL under the scheme are no better than the rights of any other unsecured creditor. That MPPL as a subsidiary of Wilo AG may have a special interest of its own in ensuring that the scheme is successful, is not sufficient in itself to invalidate the meeting of the creditors that was held, on the ground that a separate meeting ought to have been held to count the votes of MPPL. In any event, the manner in which MPPL voted and the debt value of the vote is evident from the report of the Scrutineer. The Court, it is well settled,

in deciding as to whether to sanction to a proposed compromise or arrangement is not bound to grant its sanction merely because a requisite majority exists. The extent to which the Court must grant deference to a vote cast by a particular creditor will depend upon all the facts and circumstances and undoubtedly the fact that MPPL was a related party is one circumstance that must be thrown in the balance. That circumstance, however, is not of such character as to invalidate the scheme.

-(iii) **Increase in liabilities due to MPPL** :

25. The submission that there is no explanation for the increase in the liabilities of the Petitioner to MPPL between 31st December 2005 and 30th June 2006 is without merit. The balance sheet shows that as on 31st December 2005, the outstanding to MPPL was Rs.1.75 crores. On 30th June 2006, the outstanding increased to Rs. 2.66 crores. This has been reflected in the balance sheet as an advance furnished by MPPL. The objectors have not produced material before the Court to establish that the increase in liabilities towards MPPL, as reflected in the audited Balance Sheet, was bogus or sham.

-(iv) Rejection of Ballots :

26. The report of the Scrutineer contains reasons for the rejection of certain votes. Now it is common ground before the Court that if the rejection of the ballot filed by AP Genco Ltd. (Sr. No.5 in Exh.C) is upheld , the resolution would still be carried by the requisite majority even if the other invalid votes were to be treated as votes validly cast against the scheme. The record before the Court shows that the ballot of AP Genco was cast by one Shri Murlidhar. The authorisation in favour of the aforesaid person was signed by the Chief General Manager. Rule 70(2) of the Companies (Court) Rules, 1959 provides as follows:

> "70(2) Where a body corporate which is a member or creditor (including holder of debentures) of a company authorises any person to act as its representative at the meeting of the members or creditors of the company, or of any class of them, as the case may be, a copy of the resolution of the Board of Directors or other governing body of such body corporate authorising such person to act as its representative at the meeting and certified to be a true copy by a director, the manager, the secretary, or other authorised officer of such body corporate, shall be lodged with the company at its registered office not later than 48 hours before the meeting."

In the present case, it is an admitted position that the person who sought to vote on behalf of AP Genco, did not produce any Board resolution, nor was any resolution filed at the registered office of the Company 48 hours before the meeting. In fact, in the affidavit filed on behalf of AP Genco in these proceedings, even the authorisation, if any, granted by the Board of Directors to the Chief General Manager is not forthcoming at the present stage. The provisions of Rule 70 require that where a body corporate is a member or creditor and such a body authorises a person to act as its representative at a meeting, a resolution of the Board of Directors has to be lodged with the Company at its registered office not less than 48 hours before the meeting. This was admittedly not done. Hence, the rejection of the ballot cannot be regarded as invalid.

27. Similarly, there was a valid reason for the rejection of the six other ballots which are categorised in Exh.C to the report of the Scrutineer. In the case of Sr. No.1, Mec Tubes Pvt. Ltd., a resolution of the Board, was not filed with the Company at its registered office 48 hours prior to the meeting. The Resolution was

annexed to the Ballot paper. In so far as Sr.No. 2 (Rajendra Pipes & Fittings) is concerned, a proxy dated 19th December 2006 was lodged on 23rd December 2006 in favour of Shri T. J. John/A. K. Dhar. The ballot paper was, however, signed by one Sunil Shah to whom a letter of authorisation dated 29th December 2006 was purported to have been issued. The person casting a ballot, it must be noted, was not the proprietor of Rajendra Pipes & Fittings. The ground for rejection of the ballot of Sr.No. 3 was the same as at Sr. No.1. In so far as the Company at Sr. No.4 is concerned, (New Fire Engineers Pvt.Ltd.), a proxy was lodged in favour of Shri Rameshchandra Mishra. The person who actually voted was some one else on the basis of a letter of authorization. However, there was no resolution of the Company as mandated by Rule 70(2). The entities at Sr. Nos.6 and 7 are not before the Court and have not lodged any objection to the scheme.

28. In these circumstances, having considered the record and the report of the scrutineer, it is not possible for the Court to accede to the submission of the objectors that the rejection of the ballots was lacking in bona fides and that it was illegal.

29. After the Counsel for the objectors was heard on the objection to the scheme, and arguments of the Company were also heard, this Court had indicated to Counsel appearing on behalf of the Company that it would be in the interests of justice if instructions could be taken on whether the Company was willing to improve upon the terms of the offer of settlement with the unsecured creditors. Counsel appearing on behalf of the Company fairly on instructions, agreed to do so, and submitted before the Court that the Company would be willing to associate the objectors and their Learned Counsel in the process of working out modified terms of a proposed settlement. Both the Learned Counsel appearing on behalf of the Company and the Learned Counsel appearing on behalf of the objectors have stated before the Court that as a result of extensive discussions which were held thereafter, parties have arrived at more beneficial terms of settlement for the unsecured creditors than those originally envisaged. Three options are now proposed by the Petitioner before the Court to be allowed to each of the unsecured creditors covered by the scheme. The three options are as follows :

“OPTION 1:

The unsecured creditors will be paid 40% of the outstanding principal amount due as on cut-off date in the following manner without interest and balance amount (including interest) should be waived off:

25% of the principal amount within six months from the effective date or date of exercising the option whichever is later.

15% at the end of 24 months from the effective date or date of exercising the option whichever is later.

OR

7.5% IN 18 months from the effective date or date of exercising the option whichever is later and balance 7.5% at the end of 30 months from the effective date or date of exercising the option whichever is later.

OPTION II :

The unsecured creditors will be paid total 50% of the outstanding principal amount due and payable as on the cut off date (without interest) in the following manner:

5% of the outstanding principal amount due as on cut off date, within three months from the effective date or date of exercising the option whichever is later.

45% of the outstanding principal amount due as on cut off date at the end of year 2012.

Balance amount (including interest) should be waived off.

OPTION III :

> The unsecured creditors will be paid 100% of the outstanding principal amount due as on cut off date at the end of nine years from the effective date. The interest amount should be waived off."

These options have been placed on the record by Counsel appearing on behalf of the Petitioner and have been duly signed by one of the Directors of the Company, Mr.Shailendra Jha who is authorized to do so.

30. Counsel appearing on behalf of the Objectors has stated before the Court that in the discussion which have taken place between the objectors and the Company, the aforesaid revised terms have been agreed upon and that the terms are fair and proper. Having considered the revised terms, this Court is also satisfied that the terms of the proposed settlement would enure to the benefit of all the unsecured creditors covered by the scheme and are fair and proper. Under the revised terms, there is a considerable enhancement in the terms of payment offered to the unsecured creditors. The scheme as now modified should, in the view of the Court, be sanctioned.

31. All statutory compliances requisite for the sanctioning of the scheme have been duly fulfilled. Counsel appearing on behalf of the Regional Director has stated before the Court that the provisions of the scheme are not contrary to the interest of public or to the interests of creditors or shareholders. There being no other objection to the scheme and since all the objectors before the Court who are represented by Learned Counsel Shri M.P. S. Rao have stated before the Court that they are satisfied with the terms of the scheme as modified, there is no reason why the Company Petition should not be allowed. Before concluding, it would be necessary to record that since during the course of the hearing the objections of the Learned Counsel for the objectors were heard on merits they have been dealt with in the earlier part of this order.

32. The Company Petition is accordingly made absolute in terms of prayer clauses (a) and (b), subject to the modification that clause 4.1 shall stand modified in terms of the revised options agreed upon by the Company as indicated hereinbefore.

33. The petitioner to pay costs of Rs.2500/- each to the Regional Director and the Official Liquidator within four weeks.

34. Filing and issuance of drawn up order is dispensed with.

35. All authorities to act on an ordinary copy of this order duly authenticated by the office of this Court.

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